No. 87-6548

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Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

DONALD GENE FRANKLIN,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Do this special issues submitted at the punishment phase of a capital murder trial pursuant to article 37.071(b) of the Texas Code of Criminal Procedure adequately provide for jury consideration of any aspect of the defendant's character or record or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statutes and Rules

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RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and

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[1]For clarity, Respondent in this Court, James A. Lynaugh, Director, Texas Department of Corrections, will be referred to as "the state," the real party in interest. Petitioner, Donald Gene Franklin, will be referred to as "Franklin."

through his attorney, the Attorney General of Texas, and files this Brief.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on July 30, 1987, and is reproduced in the Joint Appendix[2] at 32-34. *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987). The federal district court's memorandum opinion, order of dismissal, and final judgment are reproduced at JA 21-31. *Franklin v. Lynaugh*, No. SA-86-CA-608 (W.D.Tex. 1986) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1987. No rehearing was sought. The petition for writ of certiorari was timely filed on September 25, 1987. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Franklin bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution, and Section 19.03 of the Texas Penal Code and Article 37.071 of the Texas Code of Criminal Procedure.

[2]The state adopts the system of citation employed by Franklin. Thus, "JA" refers to the Joint Appendix; "T." followed by a volume and page number refers to the transcript in the state trial court, which contains the documents, pleadings, motions, and orders; and "R." followed by a volume and page number refers to the statement of facts in the state trial court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful and valid custody of Franklin pursuant to a judgment and sentence of the 197th Judicial District Court of Cameron County, Texas, in Cause No. 82-CR-159-C, styled *The State of Texas v. Donald Gene Franklin*.[3] Franklin was indicted by the Bexar County Grand Jury for the capital offense of murder of Mary Margaret Moran, committed in the course of committing or attempting to commit robbery or kidnapping, to which he entered a plea of not guilty. The trial was moved on a change of venue to Cameron County, where Franklin was tried by a jury and found guilty of capital murder. After hearing evidence relating to punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987). Accordingly, on March 20, 1982, Franklin was sentenced to death by lethal injection. Venue and jurisdiction then were transferred to the 289th District Court of Bexar County, Texas.

The Texas Court of Criminal Appeals affirmed Franklin's third conviction and sentence on June 26, 1985. *Franklin v. State*, 693 S.W.2d 420 (Tex. Crim. App. 1985). This Court denied a petition for writ of certiorari on February 24, 1986. *Franklin v. Texas*, ___ U.S. ___, 106 S.Ct. 1238 (1986). On March 13, 1986, the trial court

[3]Franklin had been convicted of the same offense twice before and sentenced to death after each conviction. The first conviction was reversed by the Texas Court of Criminal Appeals. *Franklin v. State*, 606 S.W.2d 818 (Tex.Crim.App. 1979). The trial court granted a new trial after Franklin's second conviction when it determined that the jury charge had been defective. *State of Texas v. Donald Gene Franklin*, Cause No. 310706.

scheduled Franklin's execution to be carried out before sunrise on April 16, 1986. Franklin filed a motion to withdraw the warrant of execution and an application for writ of habeas corpus in the trial court on April 3, 1986. The motion to withdraw the warrant of execution was denied on April 4, 1986, and the court recommended that the application for writ of habeas corpus be denied. The Court of Criminal Appeals denied a stay of execution and denied habeas corpus relief on April 8, 1986. *Ex parte Franklin*, Application No. 15,849-01.

On April 9, 1986, Franklin filed an application for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division. *Franklin v. McCotter*, No. SA-86-CA-608. The court granted a stay of execution on April 10, 1986. The case was referred to a magistrate, who conducted an evidentiary hearing on April 30 and May 1, 1986. The magistrate filed a memorandum and recommendation recommending relief be denied. The district court issued a memorandum opinion on July 9, 1986, adopted the magistrate's findings and dismissed the petition. On July 15, 1986, the district court denied a certificate of probable cause to appeal.

The trial court scheduled a new execution date for September 16, 1986. Franklin applied to the Court of Appeals for the Fifth Circuit for a certificate of probable cause to appeal. The court granted the certificate on September 12, 1986, and also entered a stay of execution. On July 30, 1987, the court issued its opinion affirming the denial of habeas corpus relief and vacating the stay of execution. *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987). Franklin then filed a petition for writ of certiorari, which this Court granted. *Franklin v. Lynaugh*, ___ U.S.___, 108 S.Ct. 221 (1987).

B. Statement of Facts

The record reflects that Mary Margaret Moran disappeared at approximately midnight on the night of July 25, 1975, from the parking lot of the Veterans' Administration Hospital, where she worked as a nurse (R.VIII-2048). Her car was found partially backed out of its parking place, with the front door open and the engine turned off (R.VIII-2103, 2210). There was a pool of blood near the car and a trail of blood leading away from it (R.VIII-2105) After an extensive four-day search, involving not only the police but local civic groups, Boy Scout troops, and private citizens as well, Ms. Moran was found, alive, on July 30, 1975 (R.IX-2445-48; 2477-78). She was lying nude in a muddy ditch in a thickly weeded field near the hospital (R.IX-2548). Her clothing was strewn around the area near her body (R.X-2522). There were lacerations on her neck, a puncture wound to the right of her Adam's Apple, and seven stab wounds on her upper body. One of the stab wounds perforated her heart (R.X-2622). The wounds were infected and infested with insects (R.X-2618). Although she was still alive when found, she died several hours later in the hospital (R.VIII-2075; X-2628). Cause of death was listed as shock resulting from loss of blood due to multiple stab wounds, dehydration, and blood in the left chest cavity (R.X-2628).

A man identified as Franklin was seen in the hospital parking lot shortly before Ms. Moran disappeared (R.VIII-2129). A car driven by Franklin was observed speeding away from the area near Ms. Moran's car (R.VIII-2207). A security guard attempted to give chase but was unable to keep up with the car. He did notice and take down the car's license plate number. The car was traced to Franklin (R.IX-2263).

Within hours of Ms. Moran's disappearance, police arrived at Franklin's home and obtained his consent to

search the premises (R.IX-2276). Police discovered a pair of trousers soaking in a pail of bloody water (R.IX-2277; X-2593). In a trash can outside the house, they found a partially burned denim purse (R.IX-2300), identified as belonging to the victim (R.VIII-2062), as well as her checkbook, surgical scissors, and other personal effects (R.IX-2407). There were blood stains in the car, as well as a blood-stained rope (R.IX-2431). The blood matched the blood type of the victim (R.X-2597). Police also recovered a knife from the trash can (R.X-2407). Franklin was taken into custody at approximately 7:00 a.m. on July 26, 1975 (R.IX-2279).

Laboratory tests revealed that soil samples from shoes belonging to Franklin matched that in the area where Ms. Moran was found (R.X-2662). Hair found on a shirt belonging to Franklin matched the victim's (R.X-2678-79), as did hair found in Franklin's car (R.X 2683). Seed and plant samples taken from the trousers found soaking in Franklin's house matched samples at the scene were the victim was found (R.X-2689-90). Finally, it was determined that the cuts in Ms. Moran's clothing could have been caused by the knife found at Franklin's house (R.X-2687).

Franklin did not testify himself, but did call one witness who testified as to the care Ms. Moran received in the hospital, and one who testified that in his opinion, Ms. Moran should have been taken to a different hospital that was better equipped to handle emergencies (R.IX-2754-57). In his summation to the jury, Franklin's attorney argued that the identifications by the state's witnesses were unreliable (R.XII-2886, 2900), and that, even if Franklin committed the act, he did not have the requisite intent because medical records indicated that Ms. Moran received inadequate treatment in the hospital (R.XII-2895-99). The jury found Franklin guilty of capital murder as charged (T.I-13A).

The state's evidence at the punishment phase of the the trial consisted of testimony from four police officers that Franklin's reputation for being a peaceful and law-abiding citizen was bad (R.XIII-2925-35). In addition, Phyllis Green testified that Franklin had raped her approximately seven months prior to Ms. Moran's murder (R.XIII-2935). The state also introduced records showing Franklin's conviction and imprisonment for a previous rape (R.XIII-2946). Franklin introduced a stipulation that he had had no disciplinary problems while he had been in the Texas Department of Corrections from 1971-74, for the prior rape conviction, and from 1976-80, while he was in custody on the current charges (R.XIII-2952-53). The jury returned affirmative answers to the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981), and Franklin was sentenced to death by the trial court (J.A. 18-20).

SUMMARY OF ARGUMENT

To be constitutional, a capital-sentencing statute must allow the defendant to introduce whatever relevant mitigating evidence he wishes the jury to consider. In addition, the jury must not be limited in its discretion to consider such evidence. Texas accomplishes this by submitting to the jury a set of special issues. The questions focus the jury's attention on the defendant's personal responsibility and moral guilt for the offense. The jury is authorized to return affirmative answers to the special issues only if it is persuaded beyond a reasonable doubt. To make this determination, the jury must necessarily consider all of the mitigating evidence before it. Requiring an additional instruction on how to consider mitigating evidence would be merely redundant and would not improve the reliability of the sentencing decision.

The Constitution does not entitle a defendant to rely on residual doubts about his guilt during the punishment phase of his trial. Therefore, even if the Texas statute does not allow for such an option, it is not constitutionally defective. However, the first special issue, concerning whether the defendant acted deliberately in committing the offense, does allow the defendant an opportunity to raise any residual doubt to the level of reasonable doubt, resulting in a negative answer to the question. Thus, the Texas statute does, in fact, allow for juror expression of residual doubt about the defendant's guilt.

Franklin's argument that the Texas scheme prevented his jury from giving independent mitigating weight to evidence of his good behavior in prison fails for two reasons. First, Texas does not restrict mitigating evidence to certain statutorily defined circumstances. Whatever evidence of his character or record or the circumstances of the offense the defendant chooses to offer is admissible and must be considered by the jury in making its punishment decisions. Second, the evidence of his good behavior was relevant only to the issue of whether he would be a future threat to society. Franklin concedes that the jury could understand the significance of the evidence to the second special issue. His attempt to ascribe any additional mitigating value to the evidence is futile.

ARGUMENT

I.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Franklin contends that Texas' capital sentencing procedure, found to be constitutional by this Court in *Jurek v. Texas*, 428 U.S. 262 (1976), no longer complies with Eighth Amendment jurisprudence as explicated in cases decided since *Jurek*. Specifically, he asserts that the special issues a jury must answer in deciding punishment in a capital case are so narrowly drawn that, absent a specific instruction on how to consider mitigating evidence, the jury can be prevented from considering relevant mitigating evidence and from engaging in the type of individualized sentencing mandated by the Constitution. Because the trial court in his case gave no such instruction, he argues that the jury could have excluded relevant mitigating evidence from its punishment deliberations so that his resulting death sentence was unconstitutionally imposed.

A. The Texas capital-sentencing statute was upheld in Jurek because it narrows the class of persons eligible for the death penalty and allows for jury consideration of mitigating evidence.

A capital-sentencing statute must meet two requirements to pass constitutional scrutiny. First, the

statute must be structured so that the death penalty is not imposed in an arbitrary and unpredictable fashion. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). It must provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Second, a capital-sentencing statute must provide for individualized sentencing by allowing the defendant to present evidence in mitigation of a sentence of death. Mandatory capital punishment statutes have been struck down because of their "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 (1976); and sentences under guided-discretion statutes have been vacated when the sentencer was prevented from considering aspects of the defendant's character or record or the circumstances of the offense. *See Lockett v. Ohio*, 438 U.S. 586 (1978).

The Texas statute was found to satisfy both requirements in *Jurek v. Texas*, 428 U.S. 262 (1976). First, the offenses for which the state may seek to impose the death penalty are limited to intentional murders committed under strictly defined circumstances. Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1988). Once a defendant is found guilty of capital murder, a separate sentencing hearing is conducted to determine whether the punishment will be life imprisonment or death. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1987). Finally, all convictions that result in a sentence of death are automatically reviewed by the Texas Court of Criminal Appeals. Id., art. 37.071(f). The Texas statute was thus structured so as to prevent the sentencing authority from imposing a sentence of death in an arbitrary and unpredictable fashion. *Jurek*, 428 U.S. at 276. Franklin does not challenge the validity of this aspect of the statute.

This Court also found that the Texas procedure provides for individualized sentencing. In Texas, after finding a defendant guilty of capital murder, the jury is not directly asked whether the punishment should be life imprisonment or death. Rather, the following set of special issues is submitted:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b). The jury must be persuaded beyond a reasonable doubt before a question may be answered affirmatively. If all of the issues submitted are answered "yes", the court sentences the defendant to death; otherwise, the sentence is life imprisonment.

In *Jurek* the Court noted that the special issues do not explicitly speak of mitigating circumstances. However, the Texas Court of Criminal Appeals had interpreted the second question so as to allow the defendant to present to the jury whatever mitigating evidence he might wish:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look at the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

Jurek, 428 U.S. at 272, quoting *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975). The Texas statute puts before the jury "all possible relevant information about the individual defendant whose fate it must decide." *Jurek*, 428 U.S. at 276. In thus providing for individualized sentencing, Texas' procedure meets the requirements imposed by the Constitution.

Further, the Court recognized that no special instruction is necessary to guide a Texas jury in carrying out its sentencing function. Providing the jury with whatever mitigating evidence the defendant could show "ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 276. And in a concurrence, Justice White, joined by Chief Justice Burger and Justice Rehnquist, agreed "that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them." *Id.* at 279.

B. The continued viability of the Texas capital-sentencing statute is not subject to doubt.

1. Jurors do not require special instructions to understand the significance of mitigating evidence with regard to the special punishment issues.

Franklin argues that the structure of the special issues might convince jurors that they are unable to consider certain evidence. He relies on the opinion expressed by three dissenting members of the Texas Court of Criminal Appeals. In *Stewart v. State*, 686 S.W.2d 118, 125-26 (Tex.Crim.App. 1984) *cert. denied*, 474 U.S. 866 (1985), Judge Clinton, joined by Judges Teague and Miller, noted that evidence of mental illness and childhood deprivation could be introduced by the defendant as mitigating circumstances, but could also be viewed as weighing in favor of a death sentence. The dissent opined that the jury ought to be instructed by the trial court that the evidence had to be considered as mitigating. *See also Johnson v. State*, 691 S.W.2d 619, 627 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 865 (1985) (Clinton, J., dissenting).

The minority members of the Court of Criminal Appeals themselves recognized, however, what this Court stated in *Eddings v. Oklahoma*, 455 U.S. 104 (1982): that evidence of difficult family history and of emotional disturbance is frequently introduced by defendants in mitigation, and juries can easily grasp its significance. *Eddings*, 455 U.S. at 115. Although the sentencing authority cannot refuse to or be precluded from considering certain evidence as mitigating, nothing in the Constitution requires that it be considered *only* as mitigating. This much is evident from the Court's

recognition in *Enmund v. Florida*, 458 U.S. 782 (1982), that, while a vicarious felony murderer may be executed in some states absent an intent to kill if sufficient aggravating factors are present, some of those same states make it a *mitigating* factor that the defendant was an accomplice to the murder and his own participation was relatively minor. *Enmund*, 458 U.S. at 791-92. It also follows from the requirement that the defendant be allowed to explain any evidence the state introduces in favor of the death sentence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Like any circumstantial evidence, that introduced at the punishment phase of a capital murder trial can be susceptible of more than one interpretation. It is for the jury to determine the weight such evidence receives. *See Eddings*, 455 U.S. at 114-15 ("[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence"); *Barclay v. Florida*, 463 U.S. 939, 961 n. 2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence); *Zant v. Stevens*, 462 U.S. 862, 891 (1983) (Constitution does not require states to adopt specific standards for instructing jury how to consider aggravating and mitigating circumstances).

The Constitution requires the sentencer to listen to the defendant's mitigating evidence but does not usurp the sentencer's role in assessing the value of that evidence. Similarly, the Texas statute allows the defendant to submit to the jury whatever mitigating evidence he chooses to and requires the jury to consider that evidence in deciding punishment, but leaves to the jury the determination of what weight to give to it. *See Cordova v. State*, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (in Texas, mitigating evidence is given effect by the influence it has on the jury during deliberations).

Other than evidence of mental or emotional disturbance, Franklin points to nothing that a defendant might offer in mitigation that the jury would not be able to consider in answering the special punishment issues. Instead, he speculates in general terms that "some" evidence "might" not appear relevant and thus not enter into the jury's deliberations. However, the special issues are in fact precisely drawn so that they focus the jury's attention on the defendant's personal responsibility and moral guilt. *See Tison v. Arizona*, ___U.S.___,___, 107 S.Ct. 1676, 1683 (1987); *Enmund v. Florida*, 458 U.S. at 801. Thus, the jury must consider any relevant mitigating evidence, *i.e.*, anything concerning the circumstances of the offense and the character or record of the defendant, in determining the answers to the issues.

The first special issue in Texas asks whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Contrary to Franklin's assertion, the answer to this question is not pre-ordained by the jury's finding that the defendant acted intentionally in committing the murder. The Court of Criminal Appeals has noted that "intentionally" and "deliberately" have different meanings in normal usage that a jury can appreciate. *Fearance v. State*, 620 S.W.2d 577, 584 (Tex.Crim.App.), cert. denied, 454 U.S. 899 (1981); *Heckert v. State*, 612 S.W.2d 549, 552 (Tex.Crim.App. 1981). The first special issue addresses the defendant's mental state not as it relates to his criminal culpability but as it concerns his moral guilt. Evidence that the murder was reflexive rather than reflective would clearly be relevant to the issue, as would evidence showing that a defendant convicted of capital murder under the law of parties did not personally kill, attempt to kill, or intend that lethal force be used. *Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984), *cert. denied*,470 U.S. 1034 (1985); *Means v. State*, 668 S.W.2d 366, 375 (Tex. Crim. App. 1983), *cert. denied*, 466 U.S. 945

(1984). The fact that in a given case a defendant might not have such evidence to present does not serve to invalidate the issue.

The third issue, too, is directed at the defendant's moral guilt and is relevant in cases where self-defense is pled.[4] Even though the jury might determine that the circumstances of the offense or of the defendant's character do not excuse his criminal guilt, such evidence could clearly be persuasive that his moral guilt is not such that he deserves the death penalty. *Cf. Smith v. State,* 676 S.W.2d 379, 393 (Tex. Crim. App. 1984), *cert. denied,* 471 U.S. 1061 (1985).

Similarly, the second special issue allows the defendant to present evidence of his character or record that tends to show that he is a good prospect for rehabilitation. Franklin identifies no specific evidence that a defendant might offer in regard to this special issue that is not obviously relevant to his future dangerousness, or that the jury is precluded from considering. He argues that the Court of Criminal Appeals has prevented adequate consideration of mitigating evidence by holding that the facts of the offense alone can be sufficient to support an affirmative finding to the special issue. *E.g., Green v. State,* 682 S.W.2d at 289. That is incorrect. The court's holding in *Green* does not preclude consideration of mitigating evidence. It simply recognizes that the facts of an offense can be relevant to whether a person will commit similar acts in the future and that, in a proper case, can outweigh the factors advanced in mitigation.

[4]Franklin's dismissal of the third special issue because it is only submitted in cases where raised by the evidence seems to imply that all mitigating factors must be relevant in every case. This clearly is not the case. Just as not every defendant will be able to point to a troubled upbringing or a history of mental or emotional disturbance, so, too, not every defendant will be able to claim that he killed in response to the victim's provocation.

Put another way, the court has merely implemented this Court's expressions in *Eddings* and *Stevens* that it is up to the sentencing authority to determine what weight to give mitigating evidence.[5]

Franklin further argues that the Texas capital-sentencing statute, as interpreted by the courts, merely *allows* the jury to take mitigating evidence into account, whereas *Lockett* and its progeny mandate that the jury "listen" to the evidence. Franklin's argument is purely speculative, and is directly contradicted by the manner in which the Texas statute actually operates. First, the special issues are carefully drawn so that the jury's attention is focused on those factors relevant to determining punishment in a capital case. Then the jury is instructed that it is to consider all of the evidence introduced at both phases of the trial in answering the special issues. Finally, the court instructs that jurors must be convinced beyond a reasonable doubt before the issues can be answered affirmatively. Unlike the situations in *Eddings* and *Hitchcock* v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987), where there were clear expressions that relevant evidence was not considered by the sentencing authority,

[5]Franklin also contends that the Texas statute is more restrictive than the one this Court found deficient in *Hitchcock v. Dugger,* ___U.S. ___, 107 S.Ct. 1821 (1987). In fact, the opposite is true. The Florida statute expressly limited the jury's consideration to certain enumerated mitigating factors. The Texas statute has no statutorily defined mitigating circumstances and anything about the facts of the offense or about his character or record that the defendant feels will redound in his favor is admissible and must be considered by the jury. This also disposes of his claim that the Texas statute, as applied, is indistinguishible from the Ohio statute at issue in *Lockett*. The only similarity between the statutes is that the Ohio statute restricted jury consideration to three mitigating circumstances, while Texas' statute asks the jury to answer three special issues. In answering the special issues, however, the Texas jury must consider all relevant mitigating evidence. *Pre-Lockett* Ohio juries had no such discretion.

Franklin points to nothing that suggests that Texas jurors do not follow their oaths and instructions.

Not only have subsequent decisions not raised questions about the Texas scheme, but the Court has repeatedly cited the Texas statute with approval as permitting jury consideration of relevant mitigating circumstances even though the special issues do not refer explicitly to mitigating factors. *See Lowenfield v. Phelps*, ___ U.S. ___, ___, No. 86-6867, slip op. at 13 (January 13, 1988); *Sumner v. Shuman*, ___ U.S. ___,___, 107 S.Ct. 2716, 2720 (1987); *Pulley v. Harris*, 465 U.S. 37, 48-50 & nn. 9, 10 (1984); *Zant v. Stevens*, 462 U.S. at 875 n. 13 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983); *Lockett v. Ohio*, 438 U.S. at 606-07. And in *Lockhart v. McCree*, ___ U.S. ___, ___, 106 S.Ct. 1758, 1769-70 (1986), the Court expressly recognized that the special punishment issues allow Texas juries sufficient discretion to consider all relevant mitigating evidence:

> Although purporting to limit the jury's role to answering several "factual" questions, in reality [the Texas capital sentencing scheme] vest[s] the jury with considerable discretion over the punishment to be imposed on the defendant. See [*Adams v. Texas,*] 448 U.S., at 46 ("This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths"); cf. *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Texas law essentially requires that...in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it").

While, on the one hand, the Texas special issues allow the jury sufficient discretion, they are not so vague that the jury's discretion is unguided and standardless:

> [T]he issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions.

Jurek, 428 U.S. at 279 (White, concurring); *accord, Lowenfield v. Phelps*, ___ U.S. at ___, slip op. at 13.

In *California v. Ramos*, 463 U.S. 992 (1983), the Court considered the defendant's contention that, inasmuch as the sentencing jury at his capital trial had been instructed as to the governor's power to commute a life sentence, "basic principles of fairness" required that it also be instructed on the governor's power to commute a death sentence. The Court rejected this argument, reasoning as follows:

> Although such an instruction would be "neutral" in the sense of giving the jury complete and factually accurate information about the commutation power, it would not "balance" the impact of the Briggs Instruction, even assuming, *arguendo*, that the current instruction has any impermissible skewing effect. Disclosure of the complete nature of the commutation power would not eliminate any skewing in favor of death or

increase the reliability of the sentencing choice.

Id. at 1011.

The same is true in Franklin's case. As discussed above, the Court has consistently reaffirmed its holding in *Jurek* that there is no constitutional infirmity in the Texas statute as interpreted by the Court of Criminal Appeals. There is no "skewing" toward death as there would be, for example, if the jury were instructed on aggravating factors without requiring a parallel instruction on mitigating evidence. There is, in short, no defect in the statute as applied which might be cured by Franklin's proposed instructions. *A fortiori*, such an instruction is not mandated by the Constitution.

2. No decision of this Court since *Jurek* has changed the standards for jury consideration of mitigating evidence.

Since deciding *Jurek* in 1976 this Court has readdressed the issue of capital-sentencing procedures on several occasions. It has held that in crafting their statutes, the states may decide what factors are relevant to the sentencing decision and that the courts will ordinarily defer to these legislative determinations. *Booth v. Maryland*, ___U.S. ___, ___, 107 S.Ct. 2529, 2532 (1987). However, the standards the states employ to guide the sentencer's decision-making cannot be excessively vague. *California v. Ramos*, 463 U.S. at 1000-01 & n. 12 (1983); *Godfrey v. Georgia*, 446 U.S. 429 (1980). In addition, individualized sentencing requires that the state's evidence in favor of a death sentence must have some bearing on the defendant's personal responsibility and moral guilt, *Tison v. Arizona*, ___ U.S. at ___, 107 S.Ct. at 1683; *Enmund v. Florida*, 458 U.S.

782, 801 (1982), and the defendant must have the opportunity to explain or deny such evidence. *Ramos*, 463 U.S. at 1001; *Gardner v. Florida*, 430 U.S. 349 (1977).

However, Franklin contends that the Court has broadened its interpretation of individualized sentencing and that, without a specific instruction, Texas jurors might not appreciate the relevance of mitigating evidence to the special issues. To the contrary, an examination of the cases on which he relies demonstrates that the Court has reiterated that the state cannot limit a defendant's ability to introduce, and the sentencer's discretion to consider as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *California v. Brown*, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987); *Lockett v. Ohio*, 438 U.S. at 604; *Jurek v. Texas*, 428 U.S. at 274. The application of these principles to specific situations has worked no substantive change in the requirement of individualized sentencing.

The Court first reviewed the individualized sentencing requirement in *Lockett v. Ohio*, 438 U.S. 586 (1978). The Ohio capital-sentencing statute defined only three mitigating circumstances that would allow for a sentence less than death. The sentencing authority could consider various non-statutory mitigating factors but only to help determine whether one of the statutorily defined circumstances was present. This scheme prevented the sentencer from giving independent mitigating weight to evidence of the defendant's character or record or to the circumstances of the offense, but that was not encompassed within one of the defined mitigating factors. Because this violated the requirement of individualized sentencing, the death sentence was reversed.

The issue next arose in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Eddings was sixteen years old when he murdered an Oklahoma highway patrolman. At trial he introduced considerable evidence of his unhappy upbringing and emotional disturbance. Nonetheless, the trial judge stated that he was prevented "as a matter of law" from considering that evidence in reaching his decision whether to impose the death penalty. *Id.* at 109. In addition, the Oklahoma Court of Criminal Appeals dismissed the evidence as irrelevant because it did not provide a legal excuse from criminal responsibility. *Id.* at 113. This Court determined that the evidence was relevant to Eddings' character and therefore was proper mitigating evidence. Just as the individualized sentencing doctrine prevented the state from withholding such evidence from the sentencer's view, it also mandated that the sentencing authority not refuse to consider the evidence. Eddings' death sentence was reversed because the sentencer did not give the necessary consideration to mitigating evidence.

Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986), involved a specific application of *Lockett*. There, the defendant attempted to introduce evidence of his good behavior while in custody awaiting trial as a mitigating factor showing that he would not be a threat to society. The trial court excluded the evidence as irrelevant to any issue in the case. This Court concluded that the evidence did bear on the defendant's ability to adapt to prison life and, as such, might serve as a basis for a sentence less than death. *Id.* at ___, 106 S.Ct. at 1671. As in *Lockett*, the state had failed to allow for individualized sentencing by precluding the sentencer from considering relevant mitigating evidence.

The Court most recently discussed the individualized sentencing doctrine in *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987). There, the defendant had

introduced evidence of his troubled upbringing and his potential for rehabilitation, but the trial court's instructions to the jury expressly referred only to the statutorily defined mitigating circumstances, which did not include these factors. *Id.* at ___, 107 S.Ct. at 1824. After receiving the advisory jury's recommendation of death, the trial court noted that the statutory mitigating factors present in the case did not outweigh the statutory aggravating factors. Consequently, he sentenced the defendant to death. As in *Eddings*, the evidence proffered by Hitchcock was relevant mitigating evidence as that term had been previously defined, and its exclusion from the sentencer's consideration resulted in the death sentence being unconstitutionally imposed.

None of these decisions represent either a departure from or an extension of the principles informing *Jurek*. In each instance, the Court reiterated the rules applied in *Jurek*: that the state cannot preclude a capital defendant from presenting to the jury relevant mitigating evidence, *i.e.*, evidence concerning the circumstances of the offense or his character and record, and cannot limit the sentencing authority's discretion by preventing it from considering such evidence.

3. No decision by the Texas Court of Criminal Appeals has changed the standards for jury consideration of mitigating evidence.

Franklin contends that by refusing to require additional instructions, the Texas Court of Criminal Appeals has narrowed the scope of the state's capital-sentencing statute. On the contrary, the Texas court has remained firm in its interpretation of the statute upon which this Court relied in *Jurek*. It has reiterated that all relevant mitigating evidence is admissible during the

punishment phase of a capital murder trial. *Anderson v. State*, 701 S.W.2d 868, 873-74 (Tex.Crim.App. 1985), *cert. denied*, ___U.S. ___, 107 S.Ct. 239 (1986); *Johnson v. State*, 691 S.W.2d 619, 624 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 865 (1985) ("*Lockett* indicated clearly that prior record and aspects of the character of the defendant are the type of mitigating factors that should be permitted. Art. 37.071 and case law that has developed under Art. 37.071 demonstrate that exactly those types of mitigating circumstances are admissible."); *Stewart v. State*, 686 S.W.2d 118, 121 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 866 (1985); *Quinones v. State*, 592 S.W.2d 933, 947 (Tex.Crim.App. 1980)[6]. In addition, the Texas court has construed the first special issue to also permit consideration of relevant mitigating circumstances:

> The first of the three issues under Art. 37.071(b) must allow consideration of mitigating factors as to whether the act was committed *deliberately*. If the jury does not unanimously answer "yes", the only authorized punishment is confinement for life. . . We do not find that subsequent construction by cases following *Jurek v. Texas*, supra, have limited the deliberateness issue so that proper consideration of mitigating circumstances is excluded.

[6]Not only has the Texas court affirmed death sentences on the basis that the special issues allow for admission of whatever relevant mitigating evidence the defendant has to offer, it has also reversed when the trial court failed to comply with the requirements of *Lockett*, *Eddings*, and *Skipper*. See *Cass v. State*, 676 S.W.2d 589 (Tex.Crim.App. 1984) (death sentence reversed because the trial court excluded testimony of five lay witnesses who "had known the defendant all his life" and who would have testified that he was unlikely to commit violent acts in the future.)

Williams v. State, 674 S.W.2d 315, 321-22 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 1110 (1985) (emphasis in original).

Franklin criticizes the Court of Criminal Appeals' refusal in *Adams v. State*, 577 S.W.2d 717, 729 (Tex. Crim. App. 1979), to give a requested instruction that the jury could extend leniency, even if it answered the special issues affirmatively. He relies on the language in *McCleskey v. Kemp*, ___ U.S. ___, ___, 107 S.Ct. 1756, 1773 (1987), that the Constitution limits the "State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence" (emphasis in original). He appears to argue from this that the juries must have the option of granting mercy to a particular defendant, even if it determines that death is warranted under the law. This Court has never held that the states must provide for leniency in their capital-sentencing statutes. In *Jurek*, the Court expressly recognized that death is the mandatory punishment in Texas if all of the special issues are answered affirmatively. *Jurek*, 428 U.S. at 278 (White, J., concurring). *Jurek* also used language almost identical to that in *McCleskey* to describe the standard to be employed at sentencing: "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek*, 428 U.S. at 271. *See also Lowenfield v. Phelps*, ___ U.S. at ___, slip op. at 13.

Now, twelve years after *Jurek*, the Texas capital-sentencing statute continues to satisfy the requirements of individualized sentencing mandated by the Eighth Amendment. None of this Court's post-*Jurek* decisions impose any new constitutional burden on the state or cast any doubt on the constitutionality of the Texas statute. Now, just as in 1976, the special issues on punishment focus the jury's attention on the defendant's personal

responsibility and moral guilt for the offense and allow the defendant to present any evidence he wishes concerning the circumstances of the crime and his own character and record. The jury is instructed that the state bears the burden of proving beyond a reasonable doubt that the special issues should be answered affirmatively and that it is to consider all of the evidence in arriving at its decision. The special issues are structured in such a way that the jury cannot answer them without taking into account all mitigating evidence offered by the defense. As submitted to the jury, the special issues possess a "common-sense core of meaning" and "juries can readily grasp the logical relevance of mitigating evidence" to the issues. *Cordova v. State*, 733 S.W.2d at 190. Because the statute thus allows for individualized sentencing, the reliability of the sentencing process would not be enhanced by an instruction regarding the jury's consideration of mitigating evidence.

II.

THE JURY IN FRANKLIN'S CASE ENGAGED IN THE INDIVIDUALIZED SENTENCING REQUIRED BY THE CONSTITUTION IN ASSESSING THE DEATH PENALTY.

Franklin contends that his case illustrates the alleged deficiencies of the Texas capital-sentencing statute. He asserts that because of the structure of the special issues and the nature of the mitigating evidence he offered, the jury might have believed it was precluded from considering his evidence, might have excluded the evidence from its deliberations, and might have failed to give the evidence independent mitigating weight. On the contrary, his case demonstrates just how the Texas statute operates in conformity with the the requirements of the Eighth Amendment.

A. A defendant is not constitutionally entitled to rely on "residual doubt" as to his guilt at the punishment phase of the trial.

Franklin points out that the state's case against him consisted of circumstantial evidence. He argues that although the evidence had convinced the jury beyond a reasonable doubt that he was guilty, there nonetheless might have been some jurors who harbored sufficient "residual doubts" that they might have felt that a sentence less than death was appropriate, and he claims that the special issues precluded the jurors from giving expression to these doubts. Therefore, he concludes, his death sentence was imposed in violation of the Eighth Amendment.

As discussed in Part I B 1, *supra*, the Constitution requires that the state not limit the defendant's presentation or the sentencer's consideration of relevant mitigating evidence. *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839. In this context, however, "relevant mitigating evidence" has a precise meaning. It has been restricted to the circumstances of the offense and the character or record of the defendant. *Hitchcock v. Dugger*, ___ U.S. at ___, 106 S.Ct. at 1669; *Woodson v. North Carolina*, 428 U.S. at 304. This Court has steadfastly refused to include "residual doubts" about the defendant's guilt within the sweep of relevant mitigating evidence. *Lockhart v. McCree*, ___ U.S. at ___, 106 S.Ct. at 1769 (some states "do not allow the defendant to argue 'residual doubts' to the jury at sentencing."); *Id.* at 1781 (Marshall, J., dissenting) (noting that "this Court has consistently refused to grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing proceedings.") Simply put, a defendant is not constitutionally entitled to rely on such

doubts as a mitigating factor.[7] Even if the Texas capital-sentencing statute does not allow the jury to consider residual doubts about the defendant's guilt in deliberating on the punishment issues, that does not render the statute, or death sentences obtained under it, invalid.

In fact, however, special issue one does allow for jury expression of any residual doubts about the defendant's guilt. Because the jury is required to find that the defendant acted not only intentionally but also deliberately, counsel has the opportunity during the punishment phase of the trial to raise any residual doubt as to guilt to the level of reasonable doubt.[8] Any juror so persuaded then would be able to answer the first issue negatively.[9]

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[7]The state bears the burden at punishment of proving beyond a reasonable doubt that the special issues should be answered affirmatively. To the extent that Franklin is arguing that the state must prove its case beyond *all* doubt, he is seeking to impose an unwarranted burden on the state.

[8]Counsel did not so attempt in Franklin's case.

[9]Franklin cannot argue that the term "intentional," an element of the offense of capital murder, and the term "deliberate," as used in the first special issue, are linguistic equivalents, thereby not allowing a jury to express residual doubt. The Texas Court of Criminal Appeals has consistently held that the two terms are not synonymous and that the term "deliberate" means "the thought process which emphases more than a will to engage in conduct and activates the intentional conduct." *Thompson v. State*, 691 S.W.2d 627 (Tex. Crim. App. 1984), *cert. denied*, ___ U.S. ___ 106 S.Ct. 184 (1985); *Fearance v. State*, 620 S.W.2d at 584. Moreover, Texas juries are, in fact, clearly able to distinguish between the two terms. *See Heckert v. State*, 612 S.W.2d 549 (Tex. Crim. App. 1981) (after finding defendant guilty of capital murder, jury answered first special issue negatively).

B. The second special issue allowed full jury consideration of the mitigating effects of Franklin's prior prison record.

During the punishment phase of his trial, Franklin introduced a stipulation that he had had no disciplinary problems while he was incarcerated for a prior rape (R.XIII-2952-53). During jury argument Franklin's attorney contended that this demonstrated that Franklin could adjust to prison life and that he would not be a danger to society if he were sentenced to life imprisonment (R.XIII-2963-65). He argued that the evidence warranted a negative answer to the second special issue: whether there was a probability that Franklin would commit acts of criminal violence that would constitute a continuing threat to society (R.XIII-2965).

Franklin acknowledges that the jury was able to understand the significance of the evidence with respect to the second issue even without an additional instruction. He contends, however, that this was evidence of his character relevant to the sentencing determination independent of whether he would be a future danger, and that the jury should have been permitted to give it independent mitigating weight. *See Lockett v. Ohio*, 438 U.S. at 605. On this basis, he asserts that because of the structure of the Texas special issues and the lack of specific instructions, the jury might not have considered this evidence as mitigating.

The Ohio statute at issue in *Lockett* required that the death penalty be assessed in particular cases unless the defendant established at least one of three statutory mitigating factors. Non-statutory mitigating factors could be given no effect in the sentencing decision except insofar as they shed some light on the circumstances delineated

in the statute. This Court held that a sentence of death imposed under this statute violated the Eighth Amendment because it did not allow the sentencer to consider, as mitigating factors, all aspects of a defendant's character or record or the circumstances of the offense proffered by the defendant. *Lockett*, 438 U.S. at 604, 608.

Lockett is distinguishable from Franklin's case in two respects. First, unlike Ohio, Texas does not limit mitigating circumstances to those defined by statute. Any evidence relating to the defendant's character or record or to the circumstances of the offense that the defendant wants to submit is admissible and is relevant to at least one of the special issues. The jury must consider the evidence when it makes its punishment decisions. Thus, the limitations imposed on the sentencer in Ohio in taking mitigating evidence into account do not exist in the Texas scheme.

Second, Franklin's assertion that evidence of his adaptability to prison life is relevant to the sentencing decision apart from what it might say about his future dangerousness is simply wrong. In *Skipper v. South Carolina*, ___ U.S. at ___, 106 S.Ct. at 1671, the Court considered whether testimony regarding a defendant's good behavior in jail constituted relevant mitigating evidence that the defendant must be allowed to put before the sentencing authority. Noting that a defendant's past conduct can be indicative of his probable future behavior, the Court held that the evidence "must be considered potentially mitigating." *Id.* at ___, 106 S.Ct. at 1671. It is obvious from the Court's discussion of the evidence that its relevance is to the issue whether the defendant will pose a future threat. *Id.*

Logic confirms that this is the appropriate consideration. The ability to adapt to prison conditions and to avoid disciplinary problems might form the basis

for a sentence less than death precisely because it indicates that the defendant might not be a danger to others. *See Skipper*, ___ U.S. at ___, 106 S.Ct. at 1672. That such evidence might also suggest valuable character traits, such as self-discipline, respecting the rights and interests of others, and the ability to work out disputes rationally and peacefully (Brief for Petitioner at 17) is simply another way of saying that it was evidence that the defendant would not be violent in prison and would not pose a danger to others. Franklin's attempt to ascribe mitigating value to the evidence apart from this is unavailing.

Further, there is simply nothing in the Texas sentencing scheme which prevented Franklin from so arguing to the jury. Defense counsel was free to characterize the evidence as he saw fit at his closing argument, and the jury would not have been precluded from accepting any such characterization if it so chose. It would then have been within the jury's carefully guided discretion to determine if, and to what extent, the evidence bore on the special issues it was required to answer.

Thus, the Texas capital-sentencing statute allows the defendant to present whatever mitigating evidence he wants to put before the jury. The special issues focus the jury's attention on the relevant sentencing considerations. In determining whether the state has proven beyond a reasonable doubt that the special issues should be answered affirmatively, the jury necessarily must consider all relevant mitigating evidence. Requiring an additional specific instruction on mitigating evidence would not provide for greater reliability in the process of deciding the defendant's sentence.

CONCLUSION

For the above reasons, the state requests that the judgment of the court below be affirmed.

Respectfully submitted,

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